MANDATORY COURT MEDIATION: DEMOGRAPHIC SUMMARY AND CONSUMER EVALUATION OF ONE COURT SERVICE

EXECUTIVE SUMMARY

Mary A. Duryee. Ph.D.

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REPORT 1: DEMOGRAPHIC INFORMATION AND MEDIATION OUTCOME DATA

Introduction

Mediation became mandatory in California for divorcing couples who disputed issues concerning their children in 1981; however, no mechanism was developed for describing the effect of the process. For example, there is no extensive or uniform information about the types of orders judges are making or the kinds of agreements developed in mediation. Questions are frequently asked about such things as: What percent of families agree to, vs. are ordered into, various custodial arrangements? How many families come to agreements in mediation? In how many cases are children interviewed or attorneys consulted? What is the average length of mediation? Such information forms the descriptive base for any more elaborate research for policy decisions.

While it was once a leader in the area of gathering demographic data about divorcing couples, California stopped gathering this information a number of years ago. As a result, it has been difficult to obtain the most rudimentary information, particularly about custody and support agreements and orders. It was not possible, for example, to find out how many couples chose joint custody during 1988. Slightly more complex data, such as a comparison between types of custody orders and whether the orders were achieved by agreement or litigation, have been equally impossible to obtain.

At the same time, the emotional climate surrounding many of the issues in family law seems to create the tendency for assertions to be made in the absence of data. This is particularly problematic for programs under continuous scrutiny by special interest groups, funding sources, and the legislature.

As more changes in the law are contemplated, it is important to establish a base of information which reflects current practices as a means of evaluating the impact of the change. It has not been possible to evaluate the effect of the change in the law in 1981 which required mediation for custody disputes because the data are not available which describe what was happening prior to the change in the law.

The purpose of this portion of the research was to provide basic demographic and outcome data from a court mediation program in one county which could be compared to other programs in the public and private sector.

Process

This project analyzed data in one county over a period of two years, 1988 through 1989. The data came from two sources: 1) information provided by

clients at the beginning of the mediation process; 2) information provided by Family Court counselors at the close of the case.

The data summarized in this report represents all the cases opened in the agency between January 1988 and December 1989 (two full years), and all cases closed during the same period. These are two different, but overlapping, populations.

The opened-cases group (N=4559) included new cases and re-referrals started during the two-year period. The closed-cases group (N=2031) included cases who had entered mediation prior to January 1988 and were closed during the study period. Cases represented in both populations were those which were both opened and closed during the study period.

The intake form was filled in by a secretary when a client called to make an appointment. (Clients were notified at the time of filing that they must see Family Court Services if there were a dispute concerning their children. At that point, they would not have been to court, unless it was a re-referral.) The secretaries had been trained to ask particular questions designed to elicit information about domestic violence and child abuse. The hard copy of this form served as the first entry into the file the counselor receives.

The closing summary was filled out by counselors after a period of six months had elapsed since significant contact with a family.

Findings

An average of one-third of the couples who filed for dissolution were referred to the court mediation program. Of those mediation referrals, 76% of the families came to full or partial agreement, while 23% could not agree on anything. The average number of sessions per family was 2.5 (or, an average of 3 hours). However, the range in the number of sessions was quite large: many families came to an agreement in the first session, which suggested a group who had merely lacked a forum in which to come to a resolution. On the other hand, a small but noticeable number of cases continued their involvement with the court for years. Counselors spent twice as much time on those cases that did not come to an agreement as on those that did. (Counselors were not restricted in the number of times families might be seen.)

Slightly more than one third (37%) of all the families came away from court with joint physical and legal custody, while slightly less than one half (47%) came away with joint legal and sole physical custody. While the actual *lived* schedule may differ significantly from the court-ordered or agreed-upon schedule, it appeared that at least according to the court order children spent more of their time with mothers. Parents were least likely to agree, and most likely to litigate, when the resulting custodial arrangement had the children with their father more time

than with their mother (and this comprised the smallest percentage of overall custodial orders). On the other hand, the custodial arrangement which was arrived at most often through agreement between the parents was joint legal and physical custody. This suggests a complex social situation in which there is not a general consensus about how the tasks of raising the children should be divided between mothers and fathers after divorce. There may be a bimodal distribution in the population, with one large segment continuing to expect mothers to raise children, and an almost equally large group who believe that children should be raised jointly by fathers and mothers. If so, this may reflect a period of changing social values which interact with deeply held personal values.

Eighteen percent of the referred families included an allegation of domestic violence at the intake phase; 17% of the families included allegations of drug and alcohol abuse; child abuse allegations occurred in 8% of the cases, and child-stealing in 2% of the cases. Overall, 28% of all the referrals for mediation included some form of allegation; of these families, 22% included allegations in two categories and 8% include allegations in 3 or more categories. (This does not include multiple allegations within one category, such as multiple allegations of domestic violence.)

A very small percentage (7%) of the cases returned to mediation more than twice, although some of those returned on separate referrals as many as 9 times. Most families used the service once (72%) while another group returned only once (21%).

A substantial number of people chose not to have (or could not afford) attorneys. Between 30% and 40% of the cases had at least one, if not two, unrepresented clients.

REPORT 2: A CONSUMER EVALUATION OF ONE COURT SERVICE

Introduction

In response to the widespread dissatisfaction with the adversary process as a means of settling custody disputes, California passed legislation in 1980 which required disputing parents to attempt to resolve their disputes amicably through mediation, prior to the opportunity to litigate them. The initial dissatisfaction centered on the damage the adversary process had on the continuing parental relationship and the staggering monetary costs to litigants of a custody trial.[1] That was the first and most comprehensive piece of legislation in the United States at that time which reformed the dispute resolution process itself (Comeaux, 1983).

It was also becoming clear, through the developing psychological research on the impact of divorce on children, that the most salient factor in children's adjustment

post-divorce was the longevity and severity of the conflict between the parents (Wallerstein and Kelly, 1975; Hess and Camera, 1979; Hetherington, 1985; Emery, 1988). As long as the process in the court unwittingly exacerbated the parental conflict, the likelihood of further harming the children was increased as a result of the legal involvement itself. The reduction of acrimony became the first stated goal of the mediation (Civ. Code, § 4607). Around the same time, Mnookin (1975) raised questions about the appropriateness of the legal arena for resolving child custody disputes generally, because of what he termed the "indeterminacy" of standards for deciding custody decisions, which led him in the direction of emphasizing the importance of "private ordering"--the decision-making processes of the family itself against the backdrop of a set of clearly defined legal parameters (Mnookin and Kornhauser, 1979).

In response to the legislation, each of the 58 counties in California developed a mediation program resulting in a group of programs suited to the history and cultural climate of each locale; as a group similar to one another in some ways and different from one another in many ways. This diversity was essential in order to serve the diversity in the state;[2] however, it has greatly complicated any evaluative process of mediation in the court setting in California.

The original legislation did not provide for any evaluation of the mediation process, nor had there been any data gathered prior to the change in the law to which to compare the new mediation process. As a consequence it was not possible to compare directly the new mediation process with the previous exclusively adjudicative orientation, in terms of either greater efficiency for the courts or client satisfaction. In 1984, legislation was passed that provided for coordination of the diverse mediation services of the 58 counties, and funds for research on the mediation process as well as other aspects of divorce, allowing the program to "take stock" for the first time.[3]

It was not, however, as if the program were operating without a foundation of information from clients. A small, growing body of research existed which suggested that mediation lived up to at least some of the claims made for it. Pearson and Thoennes (1984) evaluated the mediation programs in Los Angeles County, Hennepin County, Minnesota, and the court program for the State of Connecticut:

> "Regardless of the year in which the sample was drawn, and regardless of whether or not mediation was attempted, a majority of all parties with a custody dispute do not perceive the legal system to be satisfactory means of processing divorces...When exposed to the alternative of mediation, most respondents, in 1978 and 1981, preferred this method of dispute resolution. The points perceived in its favor include 1) its ability to identify the real, sometimes underlying, issues in a dispute; 2) the fact that the mediation process seemed less rushed and superficial; 3) the tendency for mediation to

> focus on the needs of the children; 4) the opportunity is provided individuals to be hard and to voice opinions; and 5) the less tense and defensive atmosphere it affords." (pp. 58-59)

They did not find that mediation saved time or money for the participants; however, they did find that mediation participants were less likely to re-litigate. (Subsequent researchers [Kelly, 1990] have demonstrated savings in costs to mediation participants.)

In the 10 years since its inception the mediation program in California has gathered strong support among judges (Gender Bias Report, 1989) and many if not most family law attorneys, while being the focus of controversy on other fronts. Important questions have been raised about whether mediation is a fair process for women, who enter mediation at a disadvantage in terms of their ability to command resources of power and wealth in the society at large (Gender Bias Report, 1989); whether mediation contains a bias toward joint custody; and whether it should be mandatory for all couples, including those who have experienced domestic violence (Germaine et al, 1985)

There are a number of questions about the procedural differences between counties, such as whether enough time is given to the process in some courts; and whether mediators should also provide the court with recommendations when couples do not come to agreement (McIsaac, 1985; Duryee, 1989). Additionally, there is debate about whether the "informal justice" represented by mediation is an expansion of state control and a potential denial of due process, or whether it is a liberation from state control, returning the decision-making to the parties themselves (Roehl and Cook, 1989). It is therefore important to inquire of clients about whether they experience coercion in the process, whether they prefer mediation or litigation, and whether they felt enough time was spent in mediation.

Individual courts have a need to determine if their program is operating at an acceptable level, but developing a feedback loop is procedurally difficult. Client-informants have an enormous investment in the outcome of their work with the agency because of the life- changing potential of that work; the "loadedness" of this atmosphere makes it difficult to be sure that clients have freely consented to participate in a research project or whether they felt obliged to participate for some other reason.[4] Attorney-informants have continuing relationships with court staff, particularly mediators, to protect, and may feel reluctant to be candid for fear of hurting later working relationships which might rebound on future cases. In short, it is difficult to gather information in a neutral enough environment to be able to trust the information.

Research in court settings, as a consequence, must be especially careful to protect both participants *and* the judicial process, which in turn means less freedom to gather data at any point. For example, after-the-fact and other similarly

unobtrusive measures are easier for courts to integrate into their continuing judicial and administrative processes than rigorous, randomly assigned comparison groups which ask clients to provide information during their contact with the court.

This research was originally motivated by an interest in developing a feedback loop for one court program, to be able to determine the general satisfaction level of the clients in that program. The project developed further in the direction of devising an instrument which might be routinely used to assess client satisfaction in any of the court programs, which would provide other courts with a means of self-evaluation, and perhaps, a means of looking at several court programs together.

Additionally, it is important, while considering the question of whether mediation is an improvement over litigation, to keep an open stance about potential modifications and improvements in the present system which might be guided by some process of self-evaluation on the part of court mediation programs. Is there some process which is an improvement over mandatory mediation?[5]

The issues addressed by this research are:

- What did the court clients have to say about their mediation? Particularly, did they feel that mediation or litigation would have been better? Did they feel that the mediation was handled skillfully? Did they feel that the mediation changed things for themselves, or in their relationship with their spouse?

- Did women or men feel coerced or unfairly treated? Are there any indications of gender differences in the responses to mediation?

- What did these clients feel about the mediator making a recommendation on those issues on which they failed to agree?

- What was the relationship between satisfaction and the custodial order, and between satisfaction and having reached agreement?

Process

In order to set a context around the evaluation the following is a description of this mediation service. Clients were referred by the court to mediation[6] just as the point of filing for dissolution if they indicated at that time there were disagreements concerning the children. Ordinarily, there was a period of about a month from the point of filing to the first hearing, during which the parents met with a mediator several times. (The average number of sessions was 2.5, and an average of 3.2 hours.) While most mediations reached conclusion during that period, the mediator had the option of continuing with the family after the hearing, or asking the court for a continuance. In the event that the parents did not agree on

all the issues, local court rules required a meeting between the mediator and the attorneys. The mediation was restricted to issues of raising children after the divorce, excluding financial issues, and was free for the first 5 hours. Thereafter, a fee was assessed on a sliding scale. The FCS mediations took place in the courthouse in one location and in a county building adjacent to the courthouse in the other location.

Questionnaires were sent to clients whose mediation had been completed at least six months before. The questionnaire used was a revised version of a questionnaire developed by Kelly (Kelly and Gigy, 1988), the Client Assessment of Mediation Services (CAMS), whose research compared mediating and litigating divorcing couples. The questionnaire was sent to 1020 clients (each spouse in 510 couples). The clients selected were all those whose cases were closed during a 5-month period in 1989 (N=685), and all of the clients whose cases were opened during 2 months of 1988 (N=335). an addressed, stamped envelope in which to return the questionnaire was provided; reminder post cards were sent one month after mailing the questionnaire to those who did not initially return the form.

There were two mailings, 4 months apart. A total of 209 (20%) were received back completed; 14% (139) were returned by the post office as undeliverable; 672 (66%) were not returned. More extraordinary efforts were not expended to obtain additional respondents because of one of the purposes of this study was to see what it would be like for a court operation to incorporate a feedback mechanism into its continuing operation. Few court services have the staff or resources to make more than one attempt at locating previous clients.

Frequency distributions were run on all questions on the long-form questionnaire (N=149) and Chi-square tests of significance were run on several cross-tabulations. In the interest of understanding the nature of the sample, ANOVA's were run comparing first-referral clients ("first-timers") to those who had had prior contact ("priors"); men to women; and, paired responses (those from the same couple) to single responders.

Results

The results of this evaluation suggested that there was a strong preference among these respondents for mediation over litigation, and most said they would consider calling FCS to resolve future disputes. This overall assessment was particularly important in a jurisdiction in which mediation was mandatory, suggesting that even given problems with process, it was preferred by this sample to the more traditional forum of the court for resolution of custody disputes.

Women's responses were significantly more favorable than the men's on this particular question, a suggestive and potentially important finding about what women say about their experience in light of the questions about whether

mediation is a fair forum for women. Women's responses were more favorable throughout than the men's about mediation, in this sample. However, a meaningful assessment of gender differences may require an evaluation of the legal presumptions which form the backdrop of the negotiations within a jurisdiction--the implicit and explicit "bargaining endowments" regarding custody--as well as the differences between the dispute resolution forums of mediation and litigation. In this setting, a confounding characteristic might also be that the mediation excludes financial issues, while the litigation included both custody and financial issues.

The particular aspects of the mediation which seemed to be appreciated were the opportunity to express one's own views that mediation affords, and a focus on the important issues. However, respondents were more equivocal about the nature of the agreements they reached: satisfaction with the overall result of mediation fell in the "uncertain" range, as did the responses about whether their agreements "were in everyone's best interest." Respondents also expressed distrust in their spouse's willingness to live up to the agreement, which may have been related to the uncertainty about the result of mediation. Respondents reported feeling as angry at the end of the process as they were at the beginning; that is, mediation did not seem to have an effect on the level of experienced anger toward the spouse. This corresponds to previous research which suggested that mediation is not a change-agent for the relationship.

In this sample, no relationship was found between client satisfaction and whether the counselor made a recommendation to the court. Additionally, there did not seem to be evidence that clients felt imposed upon by the mediator's values.

REPORT 3: RESEARCH IN COURT SETTINGS

Introduction

Research in court settings must operate under unique constraints in order to protect all the participants, which in turn means less freedom to gather data at any point in the process. For example, after-the-fact and other similarly unobtrusive measures are easier for courts to integrate into their continuing judicial and administrative processes than rigorous, randomly assigned comparison groups which ask clients to provide information during their contact with the court.

The two types of gathered information represented in the first two reports are quite different from one another. One is the kind of data-gathering which simply tries to describe what is happening: for example, how many referrals; what kind of referrals; what are the reported outcomes. This information becomes much more interesting when it is possible to develop a relational database, so that it is possible

to know how the information interrelates (that is, "how many of these kinds of cases had that kind of outcome"). The development of computer software which is accessible to users who are not programmers has brought this kind of data into reach of most programs without the need to add "research" staff.

The second kind of data is evaluative--asking people their opinions about something--as represented in the second report. In addition to requiring some additional knowledge about designing research projects, this kind of project benefits from consultation with a statistician, because the technical analyses require specialized knowledge about sample sizes, cell sizes, etc., are usually beyond the ken of most administrators. With this technical boost, however, it is a relatively simple matter to utilize the results of such a survey.

Report 3 is a commentary on the process of doing research within a court program, based on the experience with this research.

Commentary

As simple a process as record-keeping appears to be, it is enormously complex to track cases which are in flux, and to describe family circumstances whose diversity defies categorization. It is particularly difficult in a system which relies more heavily on case-by-case clinical judgment than on protocols or predetermined procedures. For example, it is easier to count a mediation if it is always court-ordered, and lasts a set amount of time. This county asked counselors to make decisions in terms of what was needed in that particular case; as a consequence, there was less uniformity from a case to case, and a greater need to be specific about record-keeping definitions. The data in the first report are more like snapshots of a process in motion than the video of the whole motion, and should be viewed from that perspective.

Deciding what to count, based on an estimation of which data will be useful later, may be the most important task at the outset. The tasks of gathering the information and putting it into computer are consuming enough that there is a danger of swamping an agency with paperwork and bureaucracy. Data gathering that influences the process rather than recording the process defeats its own purpose. On the other hand, it is inevitable that asking service-providers to record their work will take them away for that period of time from providing service (and from their perspective, from what it is they are supposed to be doing). It becomes very important to have a rationale for gathering the information that is compelling to everyone in the process, most particularly the reporters of the information. Making the recording process as simple as possible is also an endeavor upon which it is worth spending considerable effort. There are inevitably decision which amount to trade-offs: thoroughness versus simplicity, for example.

Our experience suggested that the tasks of establishing such a project are:

1. Conceptualizing the "units" to be counted; defining terms; analyzing what will be useful and interesting, and making a decision about the balance of usefulness with the cost of gathering it to the agency.
2. Choosing the mechanism for gathering, which includes finding the simplest point in the process to access the information so that it is "handled" the least amount of times. (I.e., having an intake form double as the form which is used for data-input; having the same person who took down the information input it into the computer, etc.) This also includes choosing the computer program, designing the forms, etc. It is worth the time designing forms which are simple to read, on as few pages as possible. Considerable effort was devoted to reducing the counselors' report form to one page of visually easy-to-read boxes to check.
3. Enlisting the participation of the staff and freeing up the agency resources for the task. This includes making sure that all participants provide feedback about the data-gathering process including the forms to be used prior to implementation; explaining the importance of the task, and the relationship of the task to the primary focus of the agency; identifying and working with staff who are particularly interested in the project, or in learning about computers; and providing release time from other duties.
4. Providing continuing information to staff about the importance of the project, including periodic checks to make sure everyone understands the definition of terms and is responding to questions uniformly.
5. Avoiding the danger of gathering information just because one is able to, without a clear understanding of what it will be used for. Too much data swamps the interpreter of the data as well as creating the sense in the agency that there is not a clear reason for each task. (The latter feeling encourages non-compliance.)
6. Maintaining continuity over time of the type of information gathered so that some comparability is achieved from year to year. (Every subsequent definition change erodes comparability of data over time).
7. Planning for glitches from the beginning. Backing up all records.
8. Developing some understanding of data interpretation and use.

Once these beginning tasks are in place, maintenance of the process is relatively easy.

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[1]The 1978 Song Report, the product of a commission whose task was to study the impact of no-fault divorce, included recommendations for mandatory mediation in those cases in which there were custody disputes. The legislative process took two more years, and included a study period. The legislation was

implemented in 1981, and required each county to establish a mediation service, and to provide mediators who met the qualifications spelled out in the bill. Personal Communication: Hugh McIsaac.

[2]For example, county sizes range from under 75,000 to over 8 million people; Los Angeles County has 234 judges while other counties have only one judge. Counties vary from the dense urban life of the Bay Area to the wilderness counties of the Sierra.

[3]Partial funding for this project comes from this legislation, which is administered by the Judicial Council of California.

[4]Court staff routinely have the experience of clients misunderstanding, mis-hearing, mis-remembering information, which is often attributed to the high level of anxiety clients experience in their contact with the court, particularly in the beginning of the process. The court experience is frequently overwhelming to people, both in terms of the nature of the issues being decided and in terms of the paperwork required. In this context care needs to be taken to assure that informed consent has been obtained.

[5]Some have suggested that "mandatory mediation" is an oxymoron: having become mandatory, it ceased to be mediation. Webster would agree. However, this may be more a problem of language than a problem in the world, in that there is a real process, utilizing skill and mediation techniques currently under way, whatever the label one uses to identify it.

[6]State statute requires mediation when parents dispute custody or visitation (Civ. Code, § 4607).